Ketua Pengarah Hasil Dalam Negeri v Classic Japan (M) Sdn Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO AA-14–1–06 OF 2019
SU TIANG JOO JC
2 FEBRUARY 2021

Revenue Law — Income tax — Assessment — Appeal against deciding order of Special Commissioners of Income Tax — Claim by taxpayer for industrial building allowance for construction of factory — Whether taxpayer entitled to claim increased exports allowance under Income Tax (Allowance for Increased Exports) Rules 1999 — Whether taxpayer's factory was industrial building and thus eligible to claim industrial building allowance — Whether Director General of Inland Revenue could impose penalty — Income Tax Act 1967 s 113(2) — Income Tax (Allowance for Increased Exports) Rules 1999

Statutory Interpretation — Construction of statutes — Strict or liberal approach — Claim by taxpayer for industrial building allowance for construction of factory — Whether taxpayer entitled to claim increased exports allowance under Income Tax (Allowance for Increased Exports) Rules 1999 — Interpretation Acts 1948 and 1967 s 17A — Income Tax (Allowance for Increased Exports) Rules 1999

Both the Director General of Inland Revenue ('DGIR') and Classic Japan (M) Sdn Bhd ('the taxpayer') appealed to the High Court against the decision of the Special Commissioners of Income Tax ('SCIT') by way of case stated pursuant to para 34 Schedule 5 Income Tax 1967 ('ITA 1967'). The taxpayer was incorporated in Malaysia and its principal activity was the collection, processing and shipment of cut flowers for export. The taxpayer claimed an industrial building allowance ('IBA') on the capital expenditure which was incurred for the construction of its factory. The DGIR conducted a tax audit on the taxpayer. Consequent to the audit, the DGIR raised: (a) a notice of assessment amounting to RM27,782.58 including penalty for the year of assessment of 2008; (b) a notice of assessment amounting to RM238,157 including penalty for the year of assessment 2009; and (c) a notice of additional assessment amounting to RM257,855.39 including penalty for the year of assessment 2010. The taxpayer being aggrieved by the said notices of assessment and notices of additional assessment filed notices of appeal to the learned SCIT. By a deciding order the SCIT had, inter alia, decided that: (i) the taxpayer was not entitled to claim for the tax incentive under the Income Tax (Allowance for Increased Exports) Rules 1999 ('1999 Rules'); (ii) the taxpayer's factory was an industrial building within the meaning of Schedule 3 of the ITA 1967; and (iii) the DGIR was entitled based upon law and fact to impose a

penalty under s 113(2) of the ITA 1967. Hence, this appeal by both the DGIR and the taxpayer. The issues for determination were: (A) whether the taxpayer was entitled to claim increased exports allowance under the 1999 Rules; (B) whether the learned SCIT was correct in law and in fact in allowing the taxpayer's appeal and deciding that the taxpayer's factory was an industrial building and thus the taxpayer was eligible to claim IBA; and (C) whether the learned SCIT was correct in law and in fact in dismissing the taxpayer's appeal on the issue of penalty and deciding that, the DGIR had both the legal and factual basis to impose a penalty under s 113(2) of the ITA 1967.

Held:

(1) The burden was upon the taxpayer to prove that it qualified for the exemption or tax incentive it claimed. To qualify for the tax incentive under the 1999 Rules the taxpayer had to prove that it was engaged in agriculture. When there was doubt or ambiguity in whether a taxpayer was entitled to claim for tax incentive, the law was to be read liberally in favour of the taxpayer. Applying the mode of construction that would promote the purpose or object underlying the 1999 Rules as required by s 17A of the Interpretation Acts 1948 and 1967 and that the tax incentive was to be read liberally in favour of the taxpayer, the arguments put forth by the taxpayer was to be persuasive and the SCIT had misdirected themselves on the law on the test to be applied and if they had applied the correct liberal approach, they would have found that the taxpayer was in fact engaged in agriculture and did qualify for the tax incentive under the 1999 Rules. The SCIT had arrived at a conclusion of mixed fact and law that no reasonable SCIT could have reached if they had correctly directed themselves (see paras 94–95, 103, 109 & 112).

(2) The taxpayer was rightfully allowed the IBA for the much more delicate produce which were fresh flowers which had to undergo processes. It could not be disputed that the cold room which formed a crucial and integral part of the building for purposes of storage of the flowers would bring it within the definition of 'industrial building' in para 37C Schedule 3 of the ITA 1967, in particular, that part of the building was 'used by a person solely for the purpose of storage of goods for export' (see paras 143–144).

(3) With the court having decided the first and second issues in favour of the taxpayer, it would follow as a matter of course that no penalty ought to be imposed upon the taxpayer. Even if the court had erred in the grounds above, acting in good faith was also a defence available to the taxpayer and the taxpayer ought not to have been penalised under s 113(2) of the ITA 1967 and the penalty ought to be set aside (see paras 145 & 177).

(4) Therefore, the appeal by the taxpayer on the first and third issues was allowed with costs and the appeal by the DGIR on the second issue was

dismissed with costs, the deciding order by the SCIT on the first and third issues was set aside, the assessment and penalty discharged and if any of these have been paid, the same was to be refunded to the taxpayer with the deposit for the taxpayer's appeal to be refunded (see para 178).

[Bahasa Malaysia summary

Kedua-dua Ketua Pengarah Hasil Dalam Negeri ('DGIR') dan Classic Japan (M) Sdn Bhd ('pembayar cukai') merayu ke Mahkamah Tinggi terhadap keputusan Suruhanjaya Khas Cukai Pendapatan ('SCIT') melalui kes yang dinyatakan menurut perenggan 34 Jadual 5 Akta Cukai Pendapatan 1967 ('ACP 1967'). Pembayar cukai diperbadankan di Malaysia dan kegiatan utamanya adalah pengumpulan, pemprosesan dan pengiriman bunga potong untuk dieksport. Pembayar cukai menuntut elaun bangunan industri ('IBA') atas perbelanjaan modal yang dikeluarkan untuk pembinaan kilangnya. DGIR melakukan audit cukai ke atas pembayar cukai. Berikutan audit, DGIR mengemukakan: (a) notis taksiran berjumlah RM27,782.58 termasuk denda untuk tahun taksiran 2008; (b) notis taksiran berjumlah RM238,157 termasuk penalti untuk tahun taksiran 2009; dan (c) notis taksiran tambahan berjumlah RM257,855.39 termasuk penalti untuk tahun taksiran 2010. Pembayar cukai yang terkilan dengan notis taksiran tersebut dan notis taksiran tambahan memfailkan notis rayuan kepada SCIT yang bijaksana. Melalui perintah penentuan SCIT antara lain memutuskan bahawa: (i) pembayar cukai tidak berhak menuntut insentif cukai di bawah Kaedah-Kaedah Cukai Pendapatan (Elaun bagi Peningkatan Eksport) 1999 ('Kaedah-Kaedah 1999'); (ii) kilang pembayar cukai adalah bangunan perindustrian dalam maksud Jadual 3 ACP 1967; dan (iii) DGIR berhak berdasarkan undang-undang dan fakta untuk mengenakan penalti di bawah s 113(2) ACP 1967. Oleh itu, rayuan ini oleh DGIR dan juga pembayar cukai. Isu-isu untuk pertimbangan adalah: (A) sama ada pembayar cukai berhak menuntut kenaikan elaun eksport berdasarkan Kaedah-Kaedah 1999; (B) sama ada SCIT yang bijaksana betul dari segi undang-undang dan fakta dalam membenarkan rayuan pembayar cukai dan memutuskan bahawa kilang pembayar cukai adalah bangunan industri dan dengan itu pembayar cukai layak menuntut IBA; dan (iii) sama ada SCIT yang bijaksana betul dari segi undang-undang dan fakta dalam menolak rayuan pembayar cukai atas isu penalti dan memutuskan bahawa, DGIR mempunyai asas undang-undang dan fakta untuk mengenakan penalti di bawah s 113(2) ACP 1967.

Diputuskan:

(1) Beban dikenakan kepada pembayar cukai untuk membuktikan bahawa dia memenuhi syarat untuk pengecualian atau insentif cukai yang dituntutnya. Untuk memenuhi syarat untuk mendapat insentif cukai di bawah Kaedah-Kaedah 1999 pembayar cukai harus membuktikan bahawa ia terlibat dalam pertanian. Ketika ada keraguan atau kekaburan

mengenai sama ada pembayar cukai berhak menuntut insentif cukai, undang-undang harus dibaca secara longgar memihak kepada pembayar cukai. Berdasarkan kaedah penafsiran yang memelihara tujuan atau objektif yang mendasari Kaedah-Kaedah 1999 seperti yang disyaratkan oleh s 17A Akta Tafsiran 1948 dan 1967 dan bahawa insentif cukai harus dibaca secara longgar untuk memihak kepada pembayar cukai, hujah-hujah yang dikemukakan oleh pembayar cukai adalah meyakinkan dan SCIT telah salah arah dalam undang-undang mengenai ujian yang akan diguna pakai dan jika mereka mengguna pakai pendekatan longgar yang betul, mereka akan mendapati bahawa pembayar cukai sebenarnya terlibat dalam pertanian dan memenuhi syarat untuk mendapat insentif cukai di bawah Kaedah-Kaedah 1999. SCIT telah sampai pada kesimpulan fakta dan undang-undang bercampur yang tidak dapat dicapai oleh SCIT yang wajar sekiranya mereka mengarahkan diri mereka dengan betul (lihat perenggan 94–95, 103, 109 & 112).

(2) Pembayar cukai dibenarkan IBA untuk hasil yang lebih halus yang merupakan bunga segar yang harus menjalani proses-proses. Tidak dapat dipertikaikan bahawa bilik dingin yang membentuk bahagian penting dan perlu daripada bangunan untuk tujuan penyimpanan bunga akan membawanya dalam definisi 'bangunan industri' di perenggan 37C, Jadual 3 ACP 1967, khususnya, bahagian bangunan itu 'digunakan oleh seseorang semata-mata untuk tujuan penyimpanan barang untuk dieksport' (lihat perenggan 143–144).

(3) Dengan mahkamah telah memutuskan isu pertama dan kedua yang memihak kepada pembayar cukai, adalah sudah tentu adalah diikuti bahawa tidak ada penalti yang harus dikenakan ke atas pembayar cukai. Sekalipun mahkamah melakukan kesalahan dengan alasan di atas, bertindak dengan niat baik juga merupakan pembelaan bagi pembayar cukai dan pembayar cukai tidak seharusnya dikenakan penalti di bawah s 113(2) ACP 1967 dan penalti tersebut harus diketepikan (lihat perenggan 145 & 177).

(4) Oleh itu, rayuan oleh pembayar cukai untuk isu pertama dan ketiga dibenarkan dengan kos dan rayuan oleh DGIR untuk isu kedua ditolak dengan kos, perintah penentuan oleh SCIT untuk isu pertama dan ketiga diketepikan, taksiran dan penalti dikeluarkan dan jika salah satu daripadanya telah dibayar, ia harus dikembalikan kepada pembayar cukai dengan deposit untuk rayuan pembayar cukai dikembalikan (lihat perenggan 178).]

Cases referred to

Alf Properties Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri [2005] 5 MLJ 717; [2005] 3 CLJ 936, CA (refd)

BR Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2008) MSTC 3 (refd)
Ben-Odeco Ltd v Powlson (Inspector of Taxes) [1978] STC 460, HL (distd)
Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235; [1981] 1 LNS 157, PC (refd)
Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd [1978] 1 MLJ 203; [1977] 1 LNS 26, FC (refd)
Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 MLJ 248; [1984] 1 CLJ Rep 108, FC (refd)
Edwards (HM Inspector of Taxes) v Bairstow & Harrison 36 TC 207, HL (refd)
Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428; [2005] 4 CLJ 810, CA (folld)
Hamdan bin Abdul Hamid @ Hamid bin Abdul Rahman v Ketua Pengarah Hasil Dalam Negeri [2010] 4 MLJ 556; [2010] 10 CLJ 130, HC (refd)
I Investment Ltd v Comptroller-General of Inland Revenue [1975] 2 MLJ 208; [1975] 1 LNS 61, FC (refd)
Inland Revenue Commissioners v Saxone, Lilley & Skinner (Holdings) Ltd [1967] 1 All ER 756, HL (refd)
Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590; [2017] 4 CLJ 265, FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 2 CLJ 1, FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co [1992] 2 MLJ 708; [1992] 1 CLJ Rep 135, SC (refd)
Ketua Pengarah Hasil Dalam Negeri v Kualiti Alam Sdn Bhd [2017] MLJU 313; [2017] 1 LNS 330, HC (folld)
Kilmarnock Equitable Co-operative Society Ltd v IRC 42 TC 675 (refd)
Lavender Confectionery & Bakery Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2018] MLJU 1962; [2018] 1 LNS 2102, HC (refd)
Littman v Barron (HM Inspector of Taxes) 33 TC 373, HL (refd)
Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 541, SC (refd)
Maughan (Surveyor of Taxes) v Free Church of Scotland (1893) 3 TC 207 (refd)
McPhail and another v Greensmith [1993] 2 EGLR 228, CA (refd)
Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2011) MSTC 30–023 (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)
Pasdec Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2016) MSTC 30–126, HC (folld)
Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors [2021] 3 MLJ 1, CA (refd)
Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2015) MSTC 30–100 (refd)

A *Port Dickson Power Bhd v Ketua Pengarah Hasil Dalam Negeri* (2012) MSTC 30–045 (refd)
Prior and Others, Re (1927) 43 TLR 784, KBD (refd)
Reed v Nova Securities [1982] BTC 300 (refd)
Sansom and another v Peay (Inspector of Taxes) [1976] 3 All ER 375, Ch D (refd)
B *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2020] 1 LNS 1707, FC (refd)
Shaklee Products (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri Civil Appeal No W-01–45–10 (unreported), CA (refd)
Smith v Coles [1905] 2 KB 827, CA (refd)
C *Syarikat Pendidikan Staffield Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 CLJ 916, HC (refd)
Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2012] 6 MLJ 411; [2013] 6 CLJ 1032, HC (refd)
D *UN Finance Bhd v Director-General of Inland Revenue* [1975] 2 MLJ 224; [1975] 1 LNS 186, FC (refd)
Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais [2021] 2 MLJ 120; [2020] 9 CLJ 521, CA (refd)

E **Legislation referred to**

Income Tax (Allowance for Increased Exports) Rules 1999 (repealed by Income Tax (Exemption) (No 6) Order 2019) rr 2, 3, 7, 8, 9
Income Tax (Exemption) (No 6) Order 2019 rr 3(2)(b), 9, 9(1), 9(2)
Income Tax 1967 ss 18, 42, 99, 113, 113(1), (2), (2)(b), Part III,
F Schedule 3, Schedule 5
Interpretation Acts 1948 and 1967 ss 15, 16, 17A
Promotion of Investments Act 1986
Rent (Agriculture) Act 1976 [UK]
Unemployment Insurance Act 1920 [UK]
G Workmen's Compensation Act 1900 [UK]

Haslina Hussain (Ridzuan Othman with her) (Inland Revenue Board of Malaysia) for Director General of Inland Revenue.
Nitin Nadkarni (Chris Toh Pei Roo with him) (Lee Hishammuddin Allen &
H *Gledhill) for Classic Japan (M) Sdn Bhd.*

Su Tiang Joo JC:

INTRODUCTION

I

[1] When there is doubt or ambiguity in whether a taxpayer is entitled to claim for tax incentive, is it settled law, that the doubt or ambiguity is to be construed strictly against the taxpayer or to be read liberally in favour of the taxpayer?

BACKGROUND

[2] Both the Director General of Inland Revenue ('DGIR') and Classic Japan (M) Sdn Bhd ('taxpayer') appealed to the High Court against the decision of the Special Commissioners of Income Tax ('SCIT') by way of case stated dated 7 June 2018 ('case stated') pursuant to para 34 Schedule 5 of the Income Tax 1967 ('the ITA 1967').

[3] Prior to the appeal to the High Court, the taxpayer had filed an appeal to the SCIT under s 99 of the ITA 1967 against the notices of assessment for years of assessment 2008 and 2009 and the notice of additional assessment for year of assessment 2010.

[4] By a deciding order dated 8 April 2016 expressed to have been decided *by way of majority* (encl 1 p 38) the SCIT had, inter alia, decided that:

(a) the taxpayer was not entitled to claim for the tax incentive under the Income Tax (Allowance for Increased Exports) Rules 1999 ('the 1999 Rules');

(b) the taxpayer's factory is an industrial building within the meaning of para 63 Schedule 3 of the ITA 1967; and

(c) the DGIR was entitled based upon law and fact to impose a penalty under s 113(2) of the ITA 1967.

[5] The issues for determination by the SCIT (encl 1 pp 2 to 4) are reproduced below:

2.1. By the Taxpayer/Perayu

Isu 1: Insentif Cukai Peningkatan Eksport

Sama ada Perayu layak untuk menuntut insentif cukai yang diperuntukkan di bawah Kaedah-Kaedah Cukai Pendapatan (Elaun bagi Peningkatan Eksport) 1999 [PU(A) 128/1999] bagi pendapatannya dari eksport hasil pertanian?

Isu 2: Elaun Bangunan Industri

(a) Sama ada kilang Perayu merupakan bangunan industri sebagaimana ditafsirkan di perenggan 63 Jadual 3 Akta Cukai Pendapatan 1967? Sekiranya jawapan adalah ya, maka Perayu layak untuk menuntut elaun bangunan industri.

(b) Sebagai alternatif, sama ada kilang Perayu adalah sebuah bangunan industri sebagaimana ditafsirkan di perenggan 37C Jadual 3 Akta Cukai Pendapatan 1967?

Sekiranya jawapan adalah ya, maka Perayu layak untuk menuntut elaun bangunan industri.

Isu 3: Penalti

A Walau apa pun isu 1 dan 2 di atas, sama ada Responden mempunyai asas perundangan dan fakta untuk mengenakan penalti di bawah subseksyen 113(2) Akta Cukai Pendapatan 1967?

2.2. By DGIR/Responden

B *Isu 1: Insentif Cukai Peningkatan Eksport*

Sama ada Responden mempunyai asas perundangan atau fakta untuk tidak membenarkan tuntutan insentif cukai yang relevan yang diperuntukkan di bawah Kaedah-Kaedah Cukai Pendapatan (Elaun bagi Peningkatan Eksport) 1999 [PU(A) 128/1999]?

C *Isu 2: Elaun Bangunan Industri*

(a) Sama ada kilang Perayu adalah bangunan industri sebagaimana ditafsir di perenggan 63 Jadual 3 Akta Cukai Pendapatan 1967?

Sekiranya jawapan adalah ya, maka Perayu layak untuk menuntut elaun bangunan industri.

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(b) Sebagai alternatif, sama ada kilang Perayu adalah sebuah bangunan industri sebagaimana ditafsirkan di perenggan 37C Jadual 3 Akta Cukai Pendapatan 1967?

Sekiranya jawapan adalah ya, maka Perayu layak untuk menuntut elaun bangunan industri.

E *Isu 3: Penalti*

Walau apa pun isu 1 dan 2 di atas, sama ada Responden mempunyai asas perundangan atau fakta untuk mengenakan penalti di bawah subseksyen 113(2) Akta Cukai Pendapatan 1967?

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[6] The deputy revenue solicitor for the DGIR had, in both her written (encl 6 para 4) and oral submissions presented on 8 December 2020, taken the position that SCIT had *unanimously* dismissed the taxpayer's appeal on the first and third issues and allowed the taxpayer's appeal on the second issue. This is G despite that the deciding order, which is reproduced in the case stated (encl 1 p 38) clearly reads as follows:

ADALAH DIPUTUSKAN SECARA MAJORITI bahawa Perayu tidak layak untuk menuntut insentif cukai di bawah Kaedah-Kaedah Cukai Pendapatan (Elaun Bagi Peningkatan Eksport) 1999;

H

ADALAH DIPUTUSKAN JUGA SECARA MAJORITI bahawa kilang Perayu adalah bangunan industri sebagaimana ditafsir di dalam perenggan 63 Jadual 3 Akta Cukai Pendapatan 1967;

ADALAH DIPUTUSKAN JUGA SECARA MAJORITI bahawa Responden mempunyai asas undang-undang dan fakta untuk mengenakan penalti di bawah I seksyen 113(2) Akta Cukai Pendapatan 1967;

... (Emphasis added.)

ISSUES FOR DETERMINATION BY THE COURT

[7] There are three issues for the determination of this court which are:

(a) whether the learned SCIT was correct in law and in fact in dismissing the taxpayer's appeal and deciding that the taxpayer is not entitled to claim for the tax incentive available under the Income Tax (Allowance for Increased Exports) Rules 1999 (PU(A) 128/1999) ('first issue');

(b) whether the learned SCIT was correct in law and in fact in allowing the taxpayer's appeal and deciding that the taxpayer's factory is an industrial building as defined under para 63 of Schedule 3 and, thus, the taxpayer is eligible to claim the industrial building allowance ('IBA') ('second issue'); and

(c) whether the learned SCIT was correct in law and in fact in dismissing the taxpayer's appeal on the issue of penalty and deciding that, the DGIR had both the legal and factual basis to impose the penalty under s 113(2) of the ITA 1967 ('third issue').

AGREED FACTS

[8] The agreed facts housed within the statement of agreed facts are reproduced below:

(a) the taxpayer is incorporated in Malaysia with a business address at 50B Persiaran Greenhill, 30450 Ipoh, Perak;

(b) the taxpayer's principal activity is the collection, processing and shipment of cut flowers for export;

(c) the taxpayer claimed an IBA on the capital expenditure which was incurred for the construction of its factory;

(d) on 26 July 2011 and 27 July 2011, the DGIR conducted a tax audit on the taxpayer;

(e) consequent to the audit, on 10 January 2013, the DGIR raised the following:

(i) a notice of assessment amounting to RM27,782.58 including penalty for the year of assessment 2008;

(ii) a notice of assessment amounting to RM238,157.06 including penalty for the year of assessment 2009; and

(iii) a notice of additional assessment amounting to RM257,855.39 including penalty for the year of assessment 2010.

(f) on 23 January 2013, the taxpayer being aggrieved by the said notices of assessment and notices of additional assessment filed notices of appeal to the learned SCIT ('Form Q'); and

(g) on 27 June 2013, the learned SCIT registered the above appeals as Rayuan No PKCP (R) 170–172 of 2013.

FACTS FOUND BY THE SCIT

[9] The facts as found by the SCIT are stated in encl 1 pp 7–20 and where relevant, will be set out in the grounds below.

LAW ON TAX APPEAL BY WAY OF CASE STATED

[10] The case stated before the court is for the court's opinion on whether, based on the facts stated by the SCIT, their decision is correct in law.

[11] It is trite law that the finding of primary facts and inferences by the SCIT are (generally) unassailable and cannot be overruled or displaced by the court. This principle was considered and applied in the seminal judgment of the Privy Council in *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235 at p 236; [1981] 1 LNS 157 as follows:

> Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event, it will be necessary for the case to be remitted to the Commissioners themselves for further findings.

[12] The following are the different kinds of findings that can be made by the SCIT:

(a) findings of primary facts which are usually admitted by the parties or proved by either of them to the satisfaction of the SCIT; and

(b) inferences drawn from such primary facts, namely:

(i) inferences of facts; or

(ii) inferences of mixed fact and law.

[13] This court sitting as an appellate court in a tax appeal has a limited function as was laid down in the following decisions of the Federal Court:

(a) *UN Finance Bhd v Director-General of Inland Revenue* [1975] 2 MLJ 224 at p 227; [1975] 1 LNS 186:

> It may be trite to say but it will be of use to remind ourselves that an appellate court in income tax cases has only a limited function to perform. *It is bound*

by the findings of facts by the Special Commissioners and set out in the statement of the case as stressed by Encik Nizar for revenue before the High Court, relying on the case of *Harrison v Griffiths* per Lord Reid at p 296:

> Where as in the case the question is a question of fact that means that the decision of the Commissioners cannot be reviewed by the court. But if the decision of any tribunal on a question of fact is unreasonable, looking to the facts on which it is based, the court can and must intervene. The question in this case, is therefore, not whether the Commissioners were wrong but whether their decision was unreasonable. (Emphasis added.)

(b) *Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 at p 252; [1984] 1 CLJ Rep 108 at p 114:

> ... The power of the court to interfere is quite limited where the findings of the SCIT are basically findings of facts. The court will interfere only if there is no evidence to justify the finding or where they have applied erroneous tests in arriving at their conclusions or have drawn a wrong inference on the facts or have misdirected themselves in law ...

(c) *I Investment Ltd v Comptroller-General of Inland Revenue* [1975] 2 MLJ 208 at p 212; [1975] 1 LNS 61:

> ... It has been said more than once that when we come to deal with income tax cases we must look at all the surrounding circumstances, not for the purpose of considering what one's own conclusion might be but for the purpose of seeing, in fact, whether there is evidence both ways — whether there is evidence upon which the Special Commissioners could arrive at their conclusion ...
>
> ... There are considerations, no doubt, the other way, and Mr Pinson strongly called my intention to them, to which, if I were a judge of fact, I should certainly have given active consideration, but it is also important that I shall not slip into it. The question is, of course a question of circumstances and degree, and there is no justification for reversing the determination of the Special Commissioners unless they had misdirected themselves in law, or proceeded without sufficient evidence in law to justify their conclusions.

(d) *Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203 at p 208; [1977] 1 LNS 26:

> The question is whether their decision was unreasonable. The learned judge cannot disturb the finding of facts by the Special Commissioners however strongly he may have felt.

[14] Besides the case of *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235; [1981] 1 LNS 157, the other leading case which deal with the grounds on which an appellate court can question the decision of the SCIT is *Edwards (HM Inspector of Taxes) v Bairstow & Harrison* 36 TC 207.

[15] In *Edwards (HM Inspector of Taxes) v Bairstow & Harrison* at p 225, Viscount Simmonds held that:

> For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.

Lord Radcliffe in the same case at p 229 held:

> When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law that this has been responsible for the determination. So there, too, there has been error in point of law.

[16] Both the judicial pronouncements in *Chua Lip Kong* and *Edwards* on the test on which a decision of the SCIT can be questioned were adopted by our Supreme Court in *Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 541.

[17] Hence, bearing in mind the above principles, this court can only intervene with the decision of the SCIT on the following grounds:

(a) misconception of law;

(b) that the SCIT had acted without any evidence or upon a view of the facts which could not reasonably be entertained; and

(c) that the SCIT had arrived at a conclusion of mixed fact and law that no reasonable SCIT could have reached if they had correctly directed themselves.

[18] With that, the court turned to the rival contentions of the taxpayer and the DGIR on the three issues in contention. The court will set out their respective contentions followed by the court's decision.

First issue: Whether the taxpayer is entitled to claim increased exports allowance under the 1999 Rules?

The taxpayer's contentions

[19] The relevant provisions of the 1999 Rules are:

(a) Rule 3:

> Subject to rules 4 and 5, where a manufacturing company or a *company engaged in agriculture, resident in Malaysia, exports* manufactured products or *agricultural produce* in the basis period for a year of assessment, there shall be given to the company an allowance to be determined in the manner as prescribed in rule 4:
>
> *Provided that an exemption on exports manufactured products is only given to manufacturer.*

(b) Rule 2:

> For the purposes of these Rules:
>
> *agricultural produce* means fresh and dried fruits, *fresh and dried flowers*, ornamental plants and ornamental fish frozen raw prawn or shrimp, frozen cooked and peeled prawn and frozen raw cuttle fish and squid; (Emphasis added.)

[20] There was no dispute that the taxpayer is 'resident in Malaysia' and has 'exported agricultural produce' in the relevant years of assessment. However, the DGIR rejected the taxpayer's claim on the basis that it is *not a company 'engaged in agriculture'*, as it *did not plant* the flowers on *its own or on its own land* (Emphasis added.)

Principles of interpretation for provisions affording relief to taxpayers

[21] It is trite that taxing statutes are ordinarily to be interpreted strictly. However, the High Court in *Ketua Pengarah Hasil Dalam Negeri v Kualiti Alam Sdn Bhd* [2017] MLJU 313; [2017] 1 LNS 330 held that these ordinary principles do not apply to the interpretation of provisions conferring relief upon taxpayers. Instead 'where ambiguity exists as to the applicability or scope of the relief available, *this court would be free to infer from the context of the legislation the true intent of parliament* and to imply, where appropriate, requirements that would give effect to that intent' (Emphasis added.). Reliance was also placed upon the provision of s 17A of the Interpretation Acts 1948 and 1967 ('Act 388') which provides that:

> Regard to be had to the purpose of Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

A **[22]** Reliance was placed upon the Court of Appeal authority of *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 at pp 433–434; [2005] 4 CLJ 810 at p 817 for the principle that parts in a revenue statute that favour a taxpayer must be read liberally.

B **[23]** As the 1999 Rules contain provisions affording relief, the taxpayer submitted that this court should infer the true intent of Parliament from the specific context of the rules in the event of ambiguity as to the scope or applicability of the allowance applicable which in this case is whether the taxpayer is engaged in agriculture and the court should not be constrained to only the ordinary dictionary meaning of the words alone. Having submitted so, the court observed that the taxpayer went on to nevertheless rely upon the *Oxford Dictionary* and on *Carswell Words and Phrases* for the definition of agriculture.

C

D **[24]** The taxpayer asserted that to be 'engaged in agriculture' does not require the taxpayer to plant the flowers on its own and/or on its own land as the true intent of Parliament is to promote exports.

E **[25]** The phrase 'engaged in agriculture' is not defined in the 1999 Rules. Further, seeing that the definition of 'agriculture' in s 18 of the ITA is restricted only to Part III of the ITA, this can only be a recognition that the specific context may require a different definition.

F **[26]** At the SCIT, the taxpayer submitted that 'engaged in agriculture' means that a company is "involved in' 'the practice of' exporting agricultural produce' by reference to the *Oxford English Dictionary* (encl 1 p 30 para 10.5.).

G **[27]** The taxpayer laid emphasis on the point that contrary to the DGIR's position, there is nothing in the 1999 Rules which requires the taxpayer *to plant* the agricultural produce that it exports *on its own and to plant on its own land*.

[28] With there being such a lacuna, there is ambiguity as to their meaning
H and invited this honourable court to ascertain the true intention of Parliament in the specific context of the 1999 Rules.

[29] The taxpayer submits that as is evident from its name, the intent of the 1999 Rules is to promote increased exports.

I **[30]** Reference was made by the taxpayer to the 1999 Budget Speech of 23 October 1998 where the Finance Minister referred to efforts that would be undertaken to encourage increased exports as part of the Budget 1999 Strategy. The 1999 Rules had been *gazetted* shortly thereafter, on 5 April 1999.

[31] The taxpayer then submitted that Parliament's true intention in the context of the 1999 Rules can be further ascertained by reference to the rules where:

(a) r 3 itself contains the caveat that 'an exemption on exports manufactured products *is only given to manufacturer*';

(b) r 2 ie the interpretation provision, defines 'agricultural produce' to include 'fresh and dried flowers';

(c) r 7 expressly stipulates that the exemption shall be granted subject to 'conditions as prescribed by the Minister';

(d) r 8 expressly provides that the exemption will not apply to a company which has received incentives under the Promotion of Investments Act 1986;

(e) r 9 refers to an exclusion list in the Schedule to the 1999 Rules which contains a list of products to which the exemption shall not apply; and

(f) however, nothing in the 1999 Rules stipulates that the increased exports allowance would only be given to a company that plants its own produce on its own land.

[32] Therefore, the taxpayer submits that as Parliament's true intention is to promote increased exports, the phrase 'engaged in agriculture' should be read widely to include a company engaged in the export of agricultural produce.

[33] The taxpayer asserted that unlike manufactured products which are subject to the express caveat that the allowance would only be given to the 'manufacturer', there is no restriction that allowance for increased exports of agricultural produce would only be given to the 'producer' of such produce.

[34] It was highlighted that by contrast, r 3(2)(b) of the Income Tax (Exemption) (No 6) Order 2019 ('2019 Rules') which revoked the 1999 Rules reproduced below, clearly contains the condition that the agricultural produce exported *must be 'planted' by the company*:

> (2) The exemption referred to in subparagraph (1) is subject to the following conditions:
>
> (b) *the agricultural produce is planted*, reared or caught *by the qualifying company* ... (Emphasis added.)

[35] Further, the amended name in the 2019 Rules also reflects a shift in emphasis of Parliament's intention from promotion of exports alone. The court observes that r 9 of these 2019 Rules carry the subtitle of revocation with r 9(1) revoking the 1999 Rules and r 9(2) expressly providing that:

> *Notwithstanding subparagraph (1), the Rules referred to in subparagraph (1) shall continue to apply to any exemption which has been granted under that Rules as if that Rules have not been revoked*. (Emphasis added.)

[36] The taxpayer also sought to draw strength from the following English authorities which gave a wide definition to the phrase 'employed/engaged in agriculture' after considering the true intention of Parliament in the context of the specific legislations.

[37] Firstly, in *Smith v Coles* [1905] 2 KB 827, in holding that a workman employed on a farm *as a farm carpenter* had been 'employed in agriculture' in the context of the Workmen's Compensation Act 1900, the English Court of Appeal rejected a restrictive reading of the legislation. In particular, LJ Matthew held:

> The statute is comprehensive in its terms, and in my opinion the class of persons usually employed in agriculture were intended to be included in the protection afforded by the Act. *We are, however, asked to read into the statute an extensive limitation to the effect that it is only to apply to persons engaged in tilling, sowing, and gathering the produce of a farm. No such limitation is indicated in the Act*, and if the argument addressed to us is to prevail extraordinary results would follow. A carter would be excluded from the provisions of the Act, or a man who superintended as foreman the work of the labourers. *This court would be slow to adopt an interpretation of the Act which would introduce exceptions that have not been made by the Legislature*. (Emphasis added.)

[38] Secondly, in *Re Prior and Others* (1927) 43 TLR 784, in finding that five women who 'consists in preparing the products of their employers for sale — eg by trimming and washing the plants, selecting and bunching cut flowers, grading the fruit and tomatoes, and packing for dispatch' were employed in agriculture in the context of the Unemployment Insurance Act 1920, Roche J stated:

> *Persons are employed in agriculture* and horticulture *when employed upon any operations done about the production, preparation, or transfer of the products of farm or garden or orchard in the best saleable condition* to a first buyer or to a salesman or agent for sale if one be employed, or to a distinct business under one proprietorship as in Daniels' case. (Emphasis added.)

[39] The taxpayer submitted that similarly, its activities in the processing and packaging of the fresh flowers amount to the preparation or transfer of the products in the best saleable condition to its buyers in Japan.

[40] Thirdly, in *McPhail and another v Greensmith* [1993] 2 EGLR 228, in holding that a farm mechanic had been employed in agriculture in the context of the Rent (Agriculture) Act 1976, the English Court of Appeal cited the

decisions in *Smith v Coles* and *Re Prior*. In particular, the court endorsed the approach in *Smith v Coles* and noted that they indicated that 'the word 'agriculture' may properly be construed as being of some width and not limited to actual working of the land'.

[41] It was pointed out by the taxpayer that in *Syarikat Pendidikan Staffield Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 CLJ 916, this honourable court gave effect to an exemption order made by the Minister as it had clearly been the Minister's intention 'to provide exemption from what would otherwise be taxable income for 'qualifying persons' ' within the definition of the said order.

[42] Therefore, the taxpayer asserted that with it having fulfilled all the prescribed requirements, the revenue has no basis to disallow the allowance given by the Minister under the 1999 Rules.

[43] The taxpayer took the position that with it having achieved the increased exports which had been Parliament's intention to promote, the DGIR cannot impose additional conditions nor dictate how the taxpayer should conduct its business and reliance was placed on the authority of *Port Dickson Power Bhd v Ketua Pengarah Hasil Dalam Negeri* (2012) MSTC 30–045 where Abang Iskandar bin Abang Hashim J (now CJSS) quoted with approval the following excerpt from *Reed v Nova Securities* [1982] BTC 300 that:

> The cases are replete in that regard in that *it is never the province of either the DGIR or even the courts to tell people how to conduct their business*. (Emphasis added.)

[44] The taxpayer assailed the DGIR's argument that the 1999 Rules which require the taxpayer to plant the produce on its own or on its own land would involve 'writing in words' which are not in the rules, and that there is 'nothing in the context to make that necessary'. Reliance was placed on the authority of *Inland Revenue Commissioners v Saxone, Lilley & Skinner (Holdings) Ltd* [1967] 1 All ER 756, where the House of Lords held:

> The Crown's main argument was that 'in use for the purposes of a trade' or of a part of a trade means wholly or mainly in use for such purposes. *But that involves writing in words which are not there, and I can see nothing in the context to make that necessary* ... (Emphasis added.)

[45] The taxpayer ended its primary submission by submitting that the SCIT in dismissing the taxpayer's appeal on the first issue had thus misdirected themselves on the law through their erroneous interpretation of the 1999 Rules.

[46] The taxpayer then added that in any event, the taxpayer had been involved in the planting of the flowers and that it had led evidence to prove that its business of exporting fresh flowers consists of two parts, with the first part being the plantation part. The plantation part was said to involve four stages; namely, the preparation of soil bed, planting (beginning), planting (maturing) and harvesting.

[47] Having asserted the above, the taxpayer complained that in arriving at its finding that it '... tidak terlibat di dalam aktiviti penanaman bunga sebagaimana yang didakwa', the SCIT had considered irrelevant factors and reached a conclusion on facts not supported by evidence. The taxpayer then went on to submit the following:

Taxpayer's pictures of involvement in planting process

[48] Firstly, the taxpayer submitted it had produced pictures to prove its involvement in the planting process, the authenticity of which have not been disputed. The SCIT also noted AW2's evidence that 'gambar yang dikemukakan adalah penting untuk membuktikan bahawa perayu terlibat dalam pertanian'.

[49] However, the SCIT disregarded this evidence solely on the basis that the pictures were not provided to the DGIR during the audit.

[50] The taxpayer submitted that there is no provision in the law that documents are inadmissible unless they have previously been produced during the audit process. As their authenticity have not been disputed, the taxpayer submitted that the SCIT should not have disregarded the pictures as they prove that the taxpayer had been involved in the planting process.

[51] Unfortunately, the pictures sought to be relied upon by the taxpayer are not part of the case stated documents before the court and, therefore, are not to be taken into account.

Land ownership

[52] Secondly, on the SCIT having held that the taxpayer '... tidak mempunyai tanah pertanian untuk menanam pokok bunga sama ada dimiliki sendiri atau disewa', the taxpayer submitted that, neither land ownership nor renting the same is a prerequisite for a company to be 'engaged in agriculture' or planting.

Letter by Jabatan Pertanian Cameron Highlands

[53] Thirdly, the taxpayer asserted that it had produced a letter issued by Jabatan Pertanian Cameron Highlands dated 17 January 2012 which states that the taxpayer 'terlibat dalam sektor pertanian'. However, this piece of evidence was rejected by the SCIT (encl 1 p 34 para 10.17) on the ground that it was unclear whether the letter had been issued in the context of the 1999 Rules or had only been a general statement of the taxpayer's business.

[54] The taxpayer submitted that the meaning of the statement that 'syarikat ini terlibat dalam sektor pertanian' is clear and amply sufficient to prove that it had been 'engaged in agriculture'. The SCIT's finding (encl 1 p 34 para 10.17) that:

> Kami berpendapat *surat* bertarikh 17 Januari 2012 *dari Jabatan Pertanian Cameron Highlands yang mengatakan bahawa Perayu terlibat dalam sektor pertanian tidak membuktikan bahawa Perayu sememangnya terlibat dengan pertanian* sebagaimana yang dikehendaki oleh Kaedah-Kaedah 128/1999 iaitu melibatkan aktiviti penanaman.

amounts to a finding of facts which no reasonable person would have arrived at, and a conclusion on facts not supported by evidence.

Contractual terms with the contract planters

[55] Fourthly, the taxpayer asserted that the SCIT had also considered irrelevant factors in holding that the fact that the contract planters are independent planters ('penanam bebas') rather than employees and are not bound to follow the taxpayer's instructions to be proof that the taxpayer is only interested in purchasing fresh flowers from the contract planters (encl 1 p 32 para 10.12).

[56] The taxpayers submitted that there are legitimate commercial reasons for the taxpayer's business practice of using contract planters. These include there being limited land available in Cameron Highlands thus necessitating the use of existing landowners as contract planters, and the benefits of not having to employ, manage, and train its own workforce. It reiterated its reliance upon this honourable court's decision in *Port Dickson Power* that the DGIR cannot dictate how taxpayers should conduct their business.

[57] In any event, the SCIT had also acknowledged (encl 1 p 16 para li) that:

> Perayu bukan sekadar membeli dan menjual bunga segar antara penanam kontrak dan Perayu.

SCIT's reference to the taxpayer's audited accounts

[58] Fifthly, the taxpayer took issue with the SCIT having held that the statement of the taxpayer's principal activity as 'memungut dan menghantar bunga yang dipotong' in its audited accounts to be proof that the taxpayer is not involved in the planting process.

[59] Relying upon the authority of *Alf Properties Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 5 MLJ 717; [2005] 3 CLJ 936, the taxpayer pointed out that the Court of Appeal had this to say regarding the objects stated in the memorandum and articles of association of a company:

> The *objects as stated* in the memorandum and articles of association of a company *by themselves are not conclusive*. This has been stated again and again by the court in various authorities. The objects of the company as stated in the memorandum and articles of association of the company permit the carrying out of the objects stated therein but the company is not obliged to carry out those objects and it is virtually not possible for the company to carry out all the objects as stated in its memorandum and articles of association. (Emphasis added.)

[60] The taxpayer submitted that the principal activities of a company as stated in the audited accounts should be treated similarly. Further, the phrase 'principal activities' itself denotes that the activities listed are not exhaustive, and does not exclude other activities which the company may carry out such as, in the present context, agriculture.

Expenditure incurred on agricultural related items

[61] Sixthly, the taxpayer submitted that the SCIT had acknowledged that the taxpayer's 'trading and profit & loss account' shows that the taxpayer has incurred expenditure for the purchase of:

> ... bunga segar, kotak, bahan kimia, penapis untuk tujuan pengawetan, kos 'phytosanitary', kos pengasapan ('fumigation') bunga dari serangga, upah buruh, upah penghantaran, elektrik, air dan belanja pembungkusan

[62] The taxpayer submitted that these expenditures are consistent with that of a company engaged in agriculture.

[63] And by reasons as submitted above, the taxpayer concluded that the SCIT in dismissing the taxpayer's appeal on the first issue has thus been based on a conclusion on facts not supported by evidence.

The DGIR's contention (on the first issue)

[64] The DGIR on the other hand submitted that the learned SCIT was correct in fact and in law in deciding that the taxpayer was not entitled to claim for the tax incentive under 1999 Rules.

[65] After pointing to the SCIT having held (encl 1 p 36 para 10.20) that the taxpayer had failed to prove on a balance of probabilities that it was engaged in agriculture so as to qualify for the tax incentive, the DGIR submitted that, for the taxpayer to be entitled to the tax incentive for increased exports, the taxpayer must establish the following requisites:

(i) the taxpayer is a company engaged in agriculture;

(ii) the taxpayer is a resident in Malaysia; and

(iii) the taxpayer exports agriculture produce in the basis period for a year of assessment.

[66] In the present case, the DGIR submitted that the taxpayer had only satisfied the requirements under (ii) and (iii) only as found by the SCIT.

[67] Wherefore, the crux of the matter is the definition of the phrase 'engaged in agriculture' that is provided in r 3 of the 1999 Rules.

[68] With the 1999 Rules being silent on the definition for the phrase 'engaged in agriculture' the DGIR placed reliance upon the Federal Court authority of *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 at p 130; [2004] 2 CLJ 265 at p 299 that the words should be given their ordinary meaning when interpreting a taxing statute and that:

> The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739:
>
> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at p 208, moral precepts are not applicable to the interpretation of revenue statutes.
>
> Secondly, ' ... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used (per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at p 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regeim* [1945] 2 All ER 499; [1946] AC 119.

A Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

B Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

[69] The DGIR then referred to *Black's Law Dictionary* (8th Ed) which C defined the word 'engage' and 'agriculture' as follows:

Engage = to employ or involve oneself, to take part in; to embark on

Agriculture = the science or art of cultivating soil, harvesting crops and raising livestock. Agriculture is broader in meaning than 'farming'; and while it includes the preparation D *of soil, the planting of seeds, the raising and harvesting of crops, and all their incidents, it also includes gardening, horticulture, viticulture, dairying, poultry, bee raising, and ranching.*

[70] Hence, the DGIR's stand is that to be entitled to a tax relief under the E 1999 Rules, the taxpayer was required to prove that the taxpayer involved itself in flower farming that includes, inter alia, *preparation of land and planting to the point of plucking the flowers*. (Emphasis added.)

[71] In the present case, the DGIR submitted that it is an established fact F that the taxpayer is not directly involved with the planting and harvesting of the flowers. The principal activity of the taxpayer is trading of flowers which is buying from the contract growers. And reliance was placed on the finding of the SCIT as excerpted below (encl 1 p 31):

G 10.7 Berdasarkan fakta di perenggan 7 di atas, kami dapati Perayu tidak terlibat di dalam aktiviti penanaman bunga sebagaimana yang didakwa. Sebaliknya Perayu hanya membeli bunga segar dari penanam kontrak berdasarkan syarat-syarat yang Perayu tetapkan. Dapatan kami ini berdasarkan kepada kenyataan saksi Perayu sendiri bahawa aktiviti utama Perayu adalah memungut, memproses dan mengeksport bunga segar.

H

[72] The DGIR submitted that the above findings made by the SCIT was based upon the proven facts at para 7.2 of case stated (encl 1 pp 7 and 8) reproduced below:

I 7.2. Fakta Yang Dibuktikan

(i) Perayu telah terlibat dalam perniagaan mengumpul, memproses dan penghantaran bunga segar sejak 2006.

(ii) Perayu menjual bunga segar dari spesies Hypericum dan Cyrystanthemum.

(iii) Perayu menjual kesemua bunga segarnya kepada syarikat induknya di Jepun

(iv) Berdasarkan akaun beraudit Perayu menunjukkan aktiviti perniagaan Perayu adalah perdagangan bunga segar.

(v) Berdasarkan profil syarikat Perayu pada muka surat 20, Eksibit F, aktiviti utama Perayu adalah untuk mengeksport bunga berkualiti tinggi dari Cameron Highlands ke Jepun.

(encl 1 p 13)

[73] The DGIR drew attention to the SCIT having found that there was no (documentary) evidence that the taxpayer was involved at the stage of plantation of the flowers as alleged by the taxpayer. At para 10.8 of the case stated (encl 1 p 31) the SCIT found that:

i) 10.8 Kami dapati keterangan saksi Perayu bahawa Perayu terlibat di peringkat penyediaan tanah, penanaman (permulaan), penanaman (matang) dan tuaian tidak disokong dengan keterangan dokumentar. Perayu cuba membuktikan bahawa mereka terlibat dengan pertanian dengan menunjukkan gambar penglibatan Perayu dalam aktiviti penanaman pokok bunga dan mengemukakan invois belian baja, racun dan peralatan pertanian.

ii) 10.9 Dapatan kami bahawa Perayu tidak terlibat dalam pertanian diperkuat dengan fakta bahawa Perayu tidak mempunyai tanah pertanian untuk menanam pokok bunga sama ada dimiliki sendiri ataupun disewa. Sebaliknya Perayu sendiri mengakui ia mempunyai 7 penanam kontrak yang akan menanam pokok bunga berdasarkan perjanjian yang dibuat dengan Perayu.

[74] The DGIR asserted that the above was based upon the facts as found by the SCIT at para 7.2 of the case stated (encl 1 p 8) as follows:

Fakta Yang Dibuktikan (encl 1 p 8):

(i) Kesemua bunga ditanam di atas tanah kepunyaan penanam kontrak yang menjadi pembekal bunga segar kepada perayu. Penanam kontrak merupakan penanam bebas yang telah mengikat perjanjian dengan perayu untuk membekalkan bunga segar hanya kepada perayu mengikut spesifikasi yang ditentukan oleh perayu.

(ii) Di antara 2007 dan 2010, perayu mempunyai seramai 7 penanam kontrak di Cameron Highlands iaitu:

(a) Great Land Talent Sdn Bhd

(b) Bertam Farm Sdn Bhd

(c) C.H. Spring Flowers United Sdn Bhd

(d) YL Flora

(e) Mung Seng Nursery

(f) Kayangan Flora

(g) Ng Farm

[75] The DGIR laid emphasis that the SCIT, after perusing the contract growers' agreements made between the taxpayer and the contract growers, had refused to accept the testimony of the taxpayer's witness that the taxpayer is involved in the preparation of land, planting and harvesting. Reliance was placed upon the following conclusion (encl 1 p 32) made by the SCIT:

> 10.11 Berdasarkan kepada terma perjanjian tersebut adalah jelas bahawa kenyataan saksi Perayu bahawa mereka terlibat dengan aktiviti penyediaan tanah, penanaman (permulaan), penanaman (matang) dan tuaian adalah tidak dibuktikan dan tidak disokong kerana tiada sebarang terma di dalam perjanjian yang menyatakan Perayu akan menjalankan apa-apa aktiviti berkaitan penanaman pokok bunga.

[76] The SCIT further found that the taxpayer is not involved in the farming/planting activity but is only interested in purchasing the fresh flowers from the contract grower. Reliance was placed by the DGIR on the following conclusion (encl 1 p 33) of the SCIT:

(i) 10.12 Sebaliknya terma perjanjian yang menyatakan bahawa penanaman kontrak merupakan penanam bebas dengan jelas membuktikan bahawa Perayu sememangnya tidak hendak terlibat dalam aktiviti penanaman pokok bunga dan hanya berminat untuk membeli bunga segar daripada penanam kontrak.

(ii) 10.13 Kesimpulan yang dapat kami buat setelah meneliti terma perjanjian di antara penanam kontrak dan Perayu ialah perjanjian tersebut merupakan perjanjian penjualan dan pembelian bunga segar. Tiada sebarang terma yang menunjukkan bahawa Perayu akan melakukan aktiviti penanaman pokok bunga bersama dengan penanam kontrak. Perjanjian tersebut langsung tidak menyentuh berkenaan keterlibatan Perayu di dalam penanaman bunga mahupun memberikan nasihat, membekalkan benih, baja dan peralatan pertanian seperti yang Perayu dakwa telah diberikan.

[77] The DGIR submitted that the SCIT's findings were grounded on the following proven facts:

7.2. *Fakta Yang Dibuktikan* (Encl 1 page 18)

> (xl) Tiada apa-apa dalam perjanjian penanaman kontrak yang menyatakan bahawa Perayu akan memberi nasihat berhubung dengan pertanian bunga segar dan pembekalan benih bunga, baja dan jentera pertanian.

(xli) Empat perjanjian penanaman kontrak sebenarnya adalah komitmen untuk menjual bunga oleh penanam kontrak kepada Perayu. Mereka adalah perjanjian dan pembelian antara Perayu dan penanam kontrak untuk memastikan bahawa Perayu mempunyai bekalan bunga berterusan pada piawaian yang ditetapkan oleh Perayu.

(xlii) Tiada apa-apa dalam perjanjian penanam kontrak yang menunjukkan bahawa Perayu terlibat dalam penanaman bunga segar dengan penanam kontrak dan tidak ada bukti untuk menunjukkan Perayu terlibat dalam kegiatan pertanian bersama-sama dengan penanam kontrak.

(lix) Perayu tidak membeli mana-mana tanah tetapi hanya menyewa tanah. Tanah yang disewa itu adalah untuk Perayu menjalankan urusan pengumpulan, pemprosesan dan penghantaran bunga potong. Perayu tidak membeli atau menyewa mana-mana tanah untuk penanam kontrak untuk menanam bunga segar bagi pihak mereka.

[78] The DGIR submitted that the SCIT in arriving at their decision also considered the taxpayer's audited account for relevant years of assessment and concluded (encl 1 p 33) that:

10.14 Dapatan kami bahawa Perayu tidak terlibat di dalam pertanian diperkukuhkan lagi melalui akaun beraudit Perayu yang menyatakan aktiviti utama Perayu adalah memungut dan menghantar bunga yang dipotong. Malah di dalam akaun beraudit Perayu menyatakan pendapatan Perayu adalah dari aktiviti menjual bunga dan 'cost of sales' tidak menunjukkan Perayu telah membelanjakan untuk terlibat dalam pertanian seperti pembelian benih, baja, racun serangga, racun rumpai, peralatan pengairan ataupun penyewaan nursery. Oleh itu, tiada apa-apa dalam 'cost of sales' yang dapat menyokong dakwaan Perayu ataupun membuktikan Perayu terlibat secara langsung ataupun tidak langsung dalam pertanian.

[79] The DGIR pointed out that the SCIT had also considered the fact that no expenses were incurred by the taxpayer for agricultural purposes.

[80] Instead, the facts were established based on the analysis on the cost of sales made by the DGIR's executive assessment officer ('RW1') who was its sole witness, based on the taxpayer's trading, profit and loss account for the year ending 31 December 2007, 31 December 2008 and 31 December 2009.

[81] Based on the analysis made by RW1, the DGIR submitted that it showed that no cost was incurred for the activity of flower farming and no expenses spent for the purchase of seeds and fertilizers which led to the SCIT holding (encl 1 p 33) that:

10.15 Kami juga dapati RW1 telah membuktikan analisis 'cost of sale' yang dibuat melalui 'Trading and Profit & Loss Account' bagi tahun berakhir 31.12.2009, 31.12.2008 dan 31.12.2009 hanya menunjukkan kos pembelian bunga segar, kotak, bahan kimia, penapis untuk tujuan pengawetan, kos 'phtosanitary', kos

pengasapan ('fumigation') bunga dari serangga, upah buruh, upah penghantaran, elektrik, air dan belanja pembungkusan. Oleh itu, hasil analisis 'cost of sale' membuktikan bahawa Perayu hanya terlibat dalam perdagangan bunga segar untuk dieksport ke Jepun dan tiada bukti melalui 'cost of sale' menunjukkan Perayu terlibat dalam pertanian.

[82] The DGIR asserted that it was correct of the SCIT to have refused to rely on the letter issued by the Department of Agriculture (Cameron Highlands) dated 17 January 2012 as proof that the taxpayer is a company engaged in agriculture as the SCIT was of the view that the contents of the letter is only a general statement by the department with regards to the business activity of the taxpayer.

[83] The DGIR maintained that based on the audit conducted and observation of RW1, the taxpayer's business does not reflect that the taxpayer is engaged in agriculture.

[84] The DGIR submitted that it is unclear, what was the justification for the Department of Agriculture to have issued such a letter. There was no clarification whether the Department of Agriculture had been furnished with all relevant information and documents in relation to the nature of the taxpayer's business before arriving at the conclusion that the taxpayer is engaged in agriculture. Besides that, the DGIR asserted there was also no information about the criteria set forth by the Department of Agriculture in determining whether a company is engaged in agriculture or not.

[85] To the contrary, the DGIR submitted that RW1's finding that the taxpayer's business activity does not reflect that the taxpayer is engaged in agriculture is supported with the observation during the audit visit, audited account, company profile, agreement with the contract growers, flow chart/process of work and a thorough analysis of the taxpayer's cost of sales and all the relevant documents such as invoices, general ledger and flower receipt records.

[86] In short, the DGIR submitted that the SCIT was right in their findings at paras 10.17 and 10.18 of the case stated reproduced below:

i) 10.17 Berkenaan dengan surat bertarikh 17 Januari 2012 daripada Jabatan Pertanian Cameron Highlands, kami berpandangan terdapat keperluan bagi Perayu untuk memanggil penulis surat tersebut untuk menerangkan apa yang beliau maksudkan apabila menulis 'Syarikat ini terlibat dalam sektor pertanian ...'. Adakah surat tersebut ditulis dalam konteks Kaedah-Kaedah 128/1999 atau ia hanya penyataan umum tentang bentuk perniagaan Perayu iaitu membeli dan mengeksport bunga segar. Tanpa memanggil penulis surat tersebut untuk memberi keterangan maka ianya telah menutup peluang Responden untuk menyoal balas

tentang isu kandungan surat itu dan mengetahui sejauh mana ia berkaitan dengan isu dalam rayuan ini. Persoalan seperti adakah yang dimaksudkan 'terlibat dalam sektor pertanian' merujuk kepada aktiviti membeli dan mengeksport bunga sahaja ataupun merujuk kepada aktiviti penanaman pokok bunga. Apakah asas yang digunakan oleh penulis surat apabila menyatakan bahawa 'Syarikat ini terlibat dalam sektor pertanian ...' tidak diketahui dan tiada penjelasan diberikan.

ii) 10.18 Kami berpendapat surat bertarikh 17 Januari 2012 daripada Jabatan Pertanian Cameron Highlands yang mengatakan bahawa Perayu terlibat dalam sektor pertanian tidak membuktikan bahawa Perayu sememangnya terlibat dengan pertanian sebagaimana yang dikehendaki oleh Kaedah-Kaedah 129/1999 iaitu melibatkan aktiviti penanaman. Kegagalan Perayu memanggil penulis surat tersebut telah menyebabkan kandungan surat itu tidak dapat membantu untuk menyokong hujahan Perayu bahawa mereka sememangnya terlibat dengan pertanian.

[87] The DGIR submitted that the SCIT was correct in their ruling (encl 1 p 35 para 10.19) that the photographs were never furnished to the DGIR during the audit exercise and with the audit having been completed, to tender the same only at the trial stage to substantiate their oral evidence is an afterthought on the part of the taxpayer.

[88] In concluding its submissions on the first issue, the DGIR submitted that the SCIT's decision should be maintained since the taxpayer is not a company directly involved in agricultural activity as is required by the (1999) Rules. Instead, the taxpayer's business is not to produce its own agriculture product but in the buying and selling of fresh flowers with the taxpayer getting its supply from its suppliers in Cameron Highlands and exporting all to its parent company in Japan.

[89] The DGIR emphasized that the principle applicable in construing a provision/rule that provides exemption or relief from tax, as in the present case, is that, the provision/rule must be construed strictly against a taxpayer.

[90] Reliance was placed by the DGIR on the authority of *Littman v Barron (HM Inspector of Taxes)* 33 TC 373 at p 387 (HL), where His Lordship Cohen LJ held:

I agree with him that the principle that in case of ambiguity a taxing statute should be construed in favor of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability.

[91] The DGIR further submitted that in order to avail itself of the incentive, the taxpayer must bring itself fairly within the express relief conferred by the statute and cited in support the case of *Ben-Odeco Ltd v Powlson (Inspector of Taxes)* [1978] STC 460 (HL) at p 471, where Lord Russel

in dealing with relief provisions in relation to tax matters held as follows:

> I start, my Lords, with the fact that this is a provision affording relief from tax. The taxpayer must persuade me that he is within it. If the reasons pro and con were in precise balance, the taxpayer on that basis would lose. But in upholding the view of the Special Commissioners ... I do find the balance is in fact against the taxpayer company.

[92] The DGIR also relied upon the authority of *Sansom and another v Peay (Inspector of Taxes)* [1976] 3 All ER 375 (Ch) at p 379, where the court held:

> In my view s 29(9) is capable of bearing either the strict construction for which counsel for the Crown has argued or the broader construction advocated by counsel for the trustees. Subsection (9) is an exempting subsection, and it is not of course my duty, even in the case of taxing statute, to try to ensure that the exemption applies.

[93] The aforesaid principle was also laid down long ago in the case of *Maughan (Surveyor of Taxes) v Free Church of Scotland* (1893) 3 TC 207, where the Court of Exchequer (Scotland) held:

> But if you claim exemption you must fall clearly within the words of the Statute, or it cannot be allowed by ingenious arguments such as were presented to us by Mr Jameson.

The court's decision on the first issue

[94] Having heard the rival contentions, the court is satisfied that premised upon the authorities cited by the DGIR, the burden is upon the taxpayer to prove that it qualifies for the exemption or tax incentive it claimed.

[95] It follows that to qualify for the tax incentive under the 1999 Rules the taxpayer has to prove that it was engaged in agriculture.

[96] In deciding whether the taxpayer had discharged this burden, the SCIT had applied a principle of law based upon its construction by the House of Lords in *Littman v Barron (HM Inspector of Taxes)* relied upon by the DGIR; that a provision giving relief *must be construed strictly against the taxpayer* or to use the words of the SCIT:

> Prinsip undang-undang yang terpakai di dalam isu menuntut insentif cukai ialah sesuatu undang-undang berkenaan insentif cukai hendaklah *ditafsirkan dengan ketat ke atas pembayar cukai* (Encl 1 p 30 para 10.6). (Emphasis added.)

[97] Such a construction found favour with the Lau Bee Lan J (now JCA) in *Hamdan bin Abdul Hamid @ Hamid bin Abdul Rahman v Ketua Pengarah Hasil Dalam Negeri* [2010] 4 MLJ 556; [2010] 10 CLJ 130 where Her Ladyship held:

[21] In the event I err and there is doubt and ambiguity in construing para 12 Schedule 2 and Part III of Schedule 5 of the RPGT Act, I am inclined to agree with the submission of learned revenue counsel that with respect to the gift of relief, it is not on imposing tax, where if there is doubt, it should be construed in favour of the taxpayer, but it should be construed in favour of the Crown. Support for this proposition is found at p 29 of *Revenue Law in Singapore and Malaysia — Cases and Commentary* (2nd Ed) by Leo D Pointon, wherein it is stated 'Where, however, a statute provides for the taxpayer to be exempted from taxation this will be *strictly construed against him' and the learned author cited the case of Littman v Barron (HM Inspector of Taxes)* [1951] 2 All ER 393; 33 TC 373 (UK Court of Appeal) Cohen LJ (at p 386): ... I agree ... that the principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability.

[22] Further support can be drawn from the case of *Ben-Odeco Ltd v Powlson (Inspector of Taxes)* [1978] STC 460 at p 471 the House of Lords (per Lord Russell of Killowen) I start, my Lords, with the fact that this is a provision affording relief from tax. The taxpayer must persuade me that he is within it. If the reasons pro and con were in precise balance, the taxpayer on that basis would lose. But in upholding the view of the Special Commissioners and of Brightman J, as I do, I find the balance is against the taxpayer company.

[98] On the other hand, our Court of Appeal in *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 at pp 433–434; [2005] 4 CLJ 810 at p 817 speaking through Gopal Sri Ram JCA held that:

... those parts in a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.

[99] It is unfortunate that the case of *Littman v Barron* was not cited by our Court of Appeal in *Exxon Chemical* which was decided in 2005 and it is equally unfortunate that the *Exxon Chemical* case was not cited by the High Court in the *Hamdan bin Abdul Hamid* case decided in 2010.

[100] After reading *Littman v Barron* carefully, with all due respect, I am satisfied that in its majority decision (Jenkins LJ dissenting), the English Court of Appeal did not decide that any ambiguity in a tax statute that gives an exemption to a taxpayer is to be construed strictly against him.

[101] In this, with all due respect, I agree with His Lordship Azizul Azmi Adnan J who held in *Ketua Pengarah Hasil Dalam Negeri v Kualiti Alam Sdn Bhd* [2017] MLJU 313; [2017] 1 LNS 330 at para [24] that:

However, a close examination of *Littman v Barron* will reveal that the Court of Appeal did not go so far as to suggest that any ambiguity in a provision giving relief must be construed against the taxpayer.

[102] With all due respect, I am of the further opinion that whilst the House of Lords authority of *Ben-Odeco Ltd v Powlson (Inspector of Taxes)* is authority for the principle that it is for the taxpayer to prove on a balance of probabilities that it is entitled to the exemption it seeks, it *did not* decide that if there is any ambiguity in the tax statute, the doubt is to be construed strictly against the taxpayer. It is observed that the case of *Littman v Barron* was in any event, not cited in this case.

[103] In the upshot, guided, nay, bound by the decision of our Court of Appeal in *Exxon Chemical*, I am satisfied that when there is doubt or ambiguity in whether a taxpayer is entitled to claim for tax incentive, the law is to be read liberally in favour of the taxpayer.

[104] Having so held, I now turn to construe the 1999 Rules.

[105] The word that is of significance in the 1999 Rules for both the taxpayer and DGIR is 'agriculture'.

[106] With all due respect to the DGIR, I find it an overly simplistic argument when it was presented during oral submissions that if the *Kamus Dewan (Edisi Ketiga)* on the meaning of 'agriculture' or 'pertanian' in Bahasa Melayu were to be referred to, it would most accurately define the same, the definition being 'tanam-menanam; perusahaan bercucuk tanam' which mean that there has to be planting on land.

[107] I disagree because the science for agriculture has grown by leaps and bounds and we should not be shackled by such an ancient concept when farms can now be housed in multi-storied buildings or vertical farms instead of being merely on open land. This can be done without even the need for the use of soil as in hydroponics which is defined by the *Concise Oxford English Dictionary* (Thumb Index Ed) as 'the process of growing plants in sand, gravel or liquid with added nutrients *but without soil*'. (Emphasis added and see also *https://www.winsightgrocerybusiness.com/fresh-food/worlds-largest-hydroponic-farm-open-dubai*)

[108] That these rules were meant to grant an incentive for *increased exports* is clearly set out in the title of the 1999 Rules ie Income Tax (Allowance for *Increased Exports*) Rules 1999. The subheading for r 3 expressly states 'Allowance for *increased exports*' and was meant for, inter alia, a company engaged in agriculture. Sections 15 and 16 of the Interpretation Acts 1948 and 1967 provide that the long title and preamble and every schedule (together with any note or table annexed to the schedules) to an Act or to any subsidiary legislation shall be construed and have effect as part of the Act or subsidiary legislation and the fact and particulars of the division into parts shall be taken

notice of in all courts and for all purposes whatsoever (see *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2020] 1 LNS 1707 (FC), at para [7] and *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265 (FC)).

[109] Applying the mode of construction that would promote the purpose or object underlying the 1999 Rules as required by s 17A Interpretation Acts 1948 and 1967 and that this tax incentive is to be read liberally in favour of the taxpayer, I find that the arguments put forth by the taxpayer, which had been set out comprehensively above and which need not be repeated here, to be persuasive and that the SCIT had misdirected themselves on the law on the test to be applied and if they had applied the (correct) liberal approach, they would have found that the taxpayer was in fact engaged in agriculture and did qualify for the tax incentive under the 1999 Rules.

[110] That the 1999 Rules have since been revoked by the Income Tax (Exemption) (No 6) Order 2019 PU(A) 162 where r 3(2)(b) now expressly states that the exemption is subject to the restriction that the agricultural produce is planted by the qualifying company, will lead to the conclusion that there must be some doubt or ambiguity in the construction of the tax incentive to be given in the 1999 Rules that requires clarification. If so, the doubt or ambiguity ought to be read liberally in favour of the taxpayer.

[111] Alternatively, the other reasonable construction would be that Parliament has deemed it fit that the 1999 Rules have served their purpose of increasing exports of agricultural produce and that such a restriction is now put in place to better exploit the land whereby the party with the technical know how would have to apply for land or team up with the landowners for purposes of obtaining such an exemption.

[112] In other words, I find that based upon the facts that obtain, particularly with the Jabatan Pertanian Cameron Highlands having stated in writing that the taxpayer was engaged in agriculture, that the 1999 Rules were meant to assist and encourage parties to increase exports of agricultural produce, there being no mention at all in the 1999 Rules that the taxpayer has to do the planting, and to do so on its own land, with the taxpayer providing the technical know how and the market to increase exports of the agriculture produce, the SCIT had arrived at a conclusion of mixed fact and law that no reasonable SCIT could have reached if they had correctly directed themselves.

Second Issue: Whether the learned SCIT was correct in law and in fact in allowing the taxpayer's appeal and deciding that the taxpayer's factory is an industrial

building as defined under para 63 of Schedule 3 and thus the taxpayer is eligible to claim IBA

The taxpayer's contention

[113] A taxpayer is entitled to claim an IBA under s 42 of the ITA 1967 where he has incurred qualifying building expenditure.

[114] The relevant provisions in Schedule 3 of the ITA are:
Paragraph 3 — 'Qualifying building expenditure':

> 3(1) Subject to paragraph 6, *qualifying building expenditure is capital expenditure incurred* on the *construction or purchase of a building* which is used at any time after its construction or purchase, as the case may be, as an *industrial building*.

[115] 'Industrial building' is defined in para 63 as follows:

> Subject to paragraphs 64 to 66, a *building is an industrial building* within the meaning of this Schedule if it is *used for the purposes of a business* and — *it is used as a factory* ...

[116] 'Factory' is defined in para 64 to mean:

> 64 *In subparagraph 63(a) 'factory' includes —*
>
> (a) a building consisting of a mill, workshop (other than a workshop used for the repair or servicing of goods, if the repair or servicing is carried out in conjunction with or incidentally to the business of selling those goods) or *other building for the housing of machinery or plant of any description for* the manufacture of any product or *the subjection of goods or materials to any process* or the generating of power used for the purposes of that manufacture or process ...

[117] On 'Storage of goods for export' para 37C provide as follows:

> 37C The provisions of this Schedule relating to industrial building shall apply, mutatis mutandis, to a building *or part thereof used by a person solely for the purpose of storage of goods for export* or for the storage of imported goods which are to be processed and distributed or re-exported ... (Emphasis added.)

[118] Thus, to qualify for the IBA, the taxpayer's factory must be a building used for the purposes of a business and used as a factory. As can be seen above, a factory includes a building used for the housing of machinery or plant of any description for the subjection of goods or materials to any process.

[119] It was an agreed fact that the taxpayer has claimed IBA on the capital expenditure incurred on the construction of its 'factory'. It is also not disputed

that the taxpayer's factory is used for the purposes of its business and houses plant and machinery. The SCIT has acknowledged these as proven facts that:

(a) 'Perayu memerlukan kilang bagi mengendalikan perniagaan eksportnya. Kilang tersebut adalah bagi kerja memproses dan menyimpan bunga segar bagi memenuhi standard dan kualiti eksport' (encl 1 page 10 para xiv); and

(b) 'Semua loji dan jentera yang disenaraikan pada muka surat 103 dari Eksibit E2, kecuali untuk kereta motor, terletak di bangunan kilang' (encl 1 page 17 para lvi).

[120] On the requirement of 'for the subjection of goods or materials to any process' housed within para 64 Schedule 3 of the ITA 1967, the taxpayer submitted that the definition uses the word 'includes' which denotes that the definition of 'factory' is inclusive rather than exhaustive. This interpretation has been adopted by Nordin Hassan J (now JCA) in *Lavender Confectionery & Bakery Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2018] MLJU 1962; [2018] 1 LNS 2102 where His Lordship held:

> [26] Firstly, the definition of factory under para 64 is not exhaustive as the word 'includes' is used.
>
> [27] In Court of Appeal case, *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707 at p 714; [2002] 3 CLJ 624 at p 632, it states:
>
> > Particular emphasis is to be placed upon the word 'includes' in this definition. *On settled principles of statutory interpretation, it is clear that when an Act of Parliament employs the expression 'includes'* to define some other word or expression, *the intention is to leave the meaning of the expression defined open ended.* By contrast, when the word 'means' is employed to define something, there is a rebuttable presumption of statutory interpretation that Parliament intends to restrict the meaning of the expression defined. The difference to which we have just adverted is plainly apparent when one compares the definition of 'equipment' with that of 'energy' and 'generating station' also appearing in s 2 of the Act. Both the latter expressions are immediately followed by the word 'means'. Mr Kaneselingam frankly concedes that the word 'includes' does leave the definition of the expression 'equipment' fairly open ended.

[121] Thus, the taxpayer submitted that a building may still come within the definition of 'factory' for the purpose of claiming the IBA even if it does not come within para 64 Schedule 3 of the ITA.

[122] On the DGIR's contention that the taxpayer's activity does not result in a change to the shape of the flowers, placing reliance upon the authority of *Kilmarnock Equitable Co-operative Society Ltd v IRC* 42 TC 675, the taxpayer submitted that this is erroneous. In *Kilmarnock* the Court of Session held that at p 685:

A

> The word 'process' in its ordinary connotation seems to me to mean no more than the application of a method of manufacture or *adaptation of goods or materials towards a particular use, purpose or end*, while *'to subject'* means *no more than to treat in some manner or other*.

B

[123] Thus, in *Kilmarnock*, the taxpayer had been allowed to claim for an IBA for capital expenditure incurred on a building where coal had been weighed and packaged with Lord Migdale holding at p 683 that:

C

> It started this operation or series of operations as a stream of dirty coal but it ended up as clean coal in an attractive wrapping. The nature of the material remained the same but it had been made more marketable and would probably attract a higher price for the same weight than if it had been sold unscreened in a large and dirty sack.

D

[124] It was an agreed fact that the taxpayer's principal activity is the collection, *processing* and shipment of cut flowers for export (encl 1 p 6 para 7.1ii). The following facts proved further shows that the flowers have been subjected to a process:

E

(a) every processing activity, namely inspection, trimming, grading, bunching and cutting, hydration, packing, and shipping are carried out at the taxpayer's factory (encl 1 p 10 para 7.2x);

(b) each and every flower received by the taxpayer will be subjected to the same process, namely (encl 1 p 11 para xvii):

F

(i) *inspection, grading, and trimming of stems to the desired size, weight and quality*; and

(ii) *all of the flowers will be treated in special chemical solutions known as pulse solution and hydration solution from Japan to ensure that they last throughout the journey to Japan*.

G

[125] The SCIT found that packaging is a very important process as flowers which are not correctly packaged will not be able to last the journey to Japan (encl 1 p 17 para liii). And that only processed flowers which will be exported are stored in the cold room (encl 1 page 17 para lii).

H

[126] It was accepted by the SCIT, that the process enables the flowers to retain their natural state and freshness so that they can be exported to fulfil the need of the taxpayer's customers in Japan (encl 1 p 36 para 10.22).

I

[127] The taxpayer added that there is value added to the processed and packaged flowers as they would be able to have a longer lifespan to survive the journey to Japan without damage.

[128] The taxpayer submitted that alternatively, and in any event, the taxpayer's factory is also an industrial building within the meaning of para 37C Schedule 3 of the ITA 1967 as the building, or part thereof is used solely for the purpose of storage of goods for export.

[129] Although the taxpayer submitted that it was not disputed that the taxpayer exports all its fresh flowers to Japan and that the processed fresh flowers are stored in the cold room at the taxpayer's factory, this was in fact, a fact that was found to have been proved rather than not having been disputed (encl 1 p 8 para xviii). Be that as it may, with this finding, the taxpayer submitted that it would alternatively be entitled to claim for the IBA under para 37C Schedule 3 of the ITA 1967 *ie that part of the building is 'used by a person solely for the purpose of storage of goods for export'*.

The DGIR's contentions

[130] The DGIR's contention, on the other hand, is that the taxpayer's factory is not an industrial building as defined in para 63 of Schedule 3 of the ITA 1967.

[131] It is the DGIR's submission that, for the taxpayer to qualify for IBA, the taxpayer's factory must establish the following requisites:

(a) it is a building used for the purpose of a business; and

(b) the building is used for the housing of machinery or plant of any description for the subjection of goods or materials to any process.

[132] The DGIR submitted that the taxpayer's factory is used for the purposes of the taxpayer's business and houses machinery or plant (encl 6 para 61). I believe that there is an obvious typographical error with the word 'not' missing before the word 'used' because the DGIR went on to contend that the taxpayer *does not* fulfill the requisite for which the building is used for the housing of machinery or plant of any description for the subjection of goods or materials to any process as testified by the RW1 before the SCIT. (Emphasis added.)

[133] To the DGIR, the crux of the matter for his appeal on the second issue is the definition of the word 'process' that is provided in para 64 Schedule 3 of the ITA 1967.

[134] The DGIR took the position that as the word 'process' is not defined under the ITA 1967, the word should be read in context as 'a process in a factory'. And reliance was placed on the definition of 'process' contained in the *Cambridge Advanced Learner's Dictionary* which defines it as:

> a method of producing goods in a factory by treating raw materials; *They have*

developed a new process for extracting aluminium from bauxite.

[135] Reference was also made by the DGIR to the *Leaners (sic) Dictionary* at *http://www.learnersdictionary.com/definition/process* which defines 'process' to mean:

> a series of actions that produce something or that lead to a particular result.

[136] Applying the two definitions obtained from the dictionaries above, the DGIR submitted that the interpretation in this case (based) upon RW1's observation during the (revenue) audit exercise and the flow chart of the packaging of the fresh flowers, the said building does not qualify for the IBA.

[137] The DGIR submitted that the activity conducted by the taxpayer is *merely packaging* and does not produce something by changing the shape of the fresh flowers and it also does not increase nor vary the market value of the fresh flowers as it is being sold to the holding company of the taxpayer at a fixed price. The *activity of packaging is not a process* since it does not produce something or lead to a particular result.

[138] Reference was then made by the SCIT to the following facts found to have been proven by the SCIT on this issue:

> Fakta Yang Dibuktikan (Encl 1 page 7)
>
> (xliv) Dengan merujuk pada muka surat 23 dan 24 Eksibit F, ia menunjukkan bahawa Perayu hanya membungkus bunga dan tidak menghasilkan sesuatu dari bunga.
>
> (xlv) Aktiviti Perayu untuk membungkus bunga tidak menghasilkan sesuatu yang mengubah bentuk bunga, tidak menaikkan harga pasaran bunga, tidak mengubah nilai bunga dan hanya mengekalkan bunga pada bentuk asal.
>
> (xlvi) Kilang Perayu tidak digunakan untuk memproses bunga segar (Encl 1 page 16)

[139] Thus, the DGIR submitted that the SCIT had erred in their decision in allowing the taxpayer's appeal for the IBA by submitting that the facts show that the taxpayer's activity in the said building does not amount to a process which can produce or change goods from its original nature as is usually produced in any factory.

[140] The DGIR proceeded to give an example by way of an illustration that a process in a factory ought to be one producing a new product from a raw material just like a factory which is fitted with machinery and equipment for the processing of palm oil to produce purified oil.

[141] It is the DGIR's contention that in this case, the process involved is not to produce goods but only to treat the flowers in order to preserve the freshness and obtain a longer lifespan for the flowers and by reason thereto, the treatment process of the flowers conducted by the taxpayer in the said building is not a process under para 64 Schedule 3 of the ACP 1967.

The court's decision on the second issue

[142] Unlike the first issue, I find that the SCIT's reasons for its findings on the second issue to be sound.

[143] If coal which was merely [re] packed into containers of a convenient size but which for all intents and purposes retained its original qualities was found to qualify as having been *subjected to process* for purposes of claiming the industrial building allowance as was held by the Court of Session in *Kilmarnock* (at p 683), all the more so that the taxpayer was rightfully allowed the IBA for the much more delicate produce in this case which is fresh flowers which has to undergo the following process as was found by the SCIT (encl 1 p 36 para 10.22):

> ... penggredan dari segi saiz, panjang, berat, pemangkasan daun, pembersihan dari makhluk perosak, merawat bunga tersebut menggunakan cecair khas dan pemungkusan ... demi menghasilkan produk bunga segar yang memenuhi standard eksport yang ditetapkan ... Tanpa melalui proses yang dinyatakan, Perayu [Taxpayer] tidak akan dapat mengeksport bunga segar yang berkualiti dan menepati kehendak pelanggan mereka di Jepun.

[144] I also agree that in any event, it cannot be disputed that the cold room which formed a crucial and integral part of the building for purposes of storage of the flowers would bring it within the definition of 'industrial building' in para 37C Schedule 3 of the ITA 1967, in particular, that part of the building is 'used by a person solely for the purpose of storage of goods for export'.

Third issue: Whether the learned SCIT was correct in law and in fact in dismissing the taxpayer's appeal on the issue of penalty and deciding that, the DGIR has both the legal and factual basis to impose a penalty under s 113(2) of the ITA 1967

[145] With the court having decided the first and second issues in favour of the taxpayer, it would follow as a matter of course that no penalty ought to be imposed upon the taxpayer.

[146] However, in the event, that this court had erred in the above decisions, I will proceed to deliberate on the rival contentions submitted by both the taxpayer and the DGIR.

The taxpayer's contentions

[147] The superior courts have provided guidance on how the revenue's discretion to impose penalty under s 113(2) of the ITA 1967 should be exercised. Amongst others, are that:

(a) s 113(2) is not a mandatory provision and the revenue must exercise discretion as to whether penalty should be imposed (see *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co* [1992] 2 MLJ 708 at pp 711–712; [1992] 1 CLJ Rep 135 p 140 (SC) where Peh Swee Chin SCJ held that it is hardly debateable that a penalty under s 113(2) is normally imposed after the exercise of judgment which must necessarily involve a consideration of relevant circumstances);

(b) where the matter arises as a result of a technical adjustment ie the DGIR's differing interpretation of legislation, penalty should not be imposed (see *Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2015) MSTC 30–100 where Mairin bin Idang @ Martin JC held that where the appellant having relied upon a professional tax consultant took a position that the payments were capital and not revenue expenditure due to differing interpretations, it ought not to be penalised);

(c) that a penalty should not be imposed where the taxpayer had as in this case, acted in good faith, taken professional advice, made full disclosure and the matter in dispute arises from a technical adjustment (see *Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 30–023 where Alizatul Khair Osman Khairuddin J (as Her Ladyship then was) agreed with the SCIT that as the incorrect return was made in good faith, the penalty imposed should accordingly be waived); and

(d) even if there was an incorrect return or information submitted, this was done in good faith.

[148] Post the close of written and oral submissions, by way of an exchange of letters, one dated 11 December 2020 from the taxpayer (encl 13), one from the DGIR dated 15 January 2021 (encl 14) and another from the taxpayer dated 21 January 2021 (encl 15), the authority of *Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [2021] 2 MLJ 120; [2020] 9 CLJ 521 (CA) was cited for, inter alia, the ratio decidendi that as a public decision making body, the DGIR has a duty to give reasons for its decision when challenged irrespective of whether the challenge was by way of judicial review or otherwise.

The DGIR's contentions

[149] Relying on s 113(2)(b) of the ITA 1967, a 45% penalty was imposed on the taxpayer. This section provides that a person may be required to pay a penalty on the amount of tax which has been undercharged in consequence of the giving of an incorrect return.

[150] The DGIR submitted that the above provision clearly provides that a penalty equal to the amount of the tax which has been undercharged may be imposed on the person in two situations:

(a) when that person makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another; or

(b) when that person gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person;

[151] The DGIR submitted that it is pertinent to note that, under a self-assessment system, the taxpayer is required to submit a return form (known as Form C) to declare his income and to compute his own tax annually. It is a duty cast upon the taxpayer in submitting his return to declare the correct income and claim the correct expenses, failing which, a penalty for incorrect returns under s 113 of the ITA 1967 will be imposed.

[152] Reliance was placed upon *Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 6 MLJ 411; [2013] 6 CLJ 1032, where the High Court speaking through Rohana Yusuf J (now PCA) held:

> [48] This country is now adopting a self-assessment regime. Thus, in line with the present policy where submission of returns are based on self-assessment by a taxpayer, a taxpayer must be mindful of his responsibility to submit correct returns and must necessarily do so upon necessary consultation to ensure correct returns are submitted.

[153] The DGIR submitted that it is his discretion whether to impose penalties under sub-s 113(2) of the Act after considering all relevant facts and circumstances and in this case, after having done so, the DGIR had only imposed a penalty of 45%.

[154] The DGIR drew the court's attention to the case of *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co* [1992] 2 MLJ 708; [1992] 1 CLJ Rep 135, where the Supreme Court held that:

> The learned judge found from s 113(2), a discretion vested in the Revenue, as to

whether or not to impose a penalty thereunder. His Lordship said: '... He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances ...'

[155] The DGIR submitted in imposing the penalty in this case, the DGIR had considered '... all relevant facts and circumstances ...', and it had not been according to his whim and fancy. And that the DGIR had considered the following:

(a) the fact that the assessment was raised pursuant to a field audit conducted by the DGIR on the taxpayer;

(b) from the audit exercise, it was discovered that the taxpayer failed to give a correct return by claiming the tax incentive that it did not qualify for under the Rules; and

(c) the DGIR's audit findings were based on a review of documents and facts gathered during the audit exercise.

[156] Section 113(2) of the ITA 1967 is reproduced below:

> Where a person
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person, then, ... the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct ...

[157] The DGIR pointed out that s 113 of the Act has two parts. The first part, in sub-s 113(1), involves a situation where an offence has been committed, the person is charged in court and prosecuted. As against this offence, the law provides clearly that when a person is being prosecuted a defence of good faith is available; whereas, the second part of s 113 ie sub-s 113(2), provides for the imposition of a penalty to a maximum of 100% of the tax undercharged when there is no prosecution.

[158] The DGIR submitted that in this instance, by which the court understood the DGIR as submitting that when the DGIR imposes a penalty pursuant to s 113(2)(b), this subsection does not provide for the defence of good faith against its imposition and to allow such a defence would amount to an error in law for purposes of dismissing any penalty imposed by the DGIR (see the DGIR's written submissions in encl 6 para 55).

[159] The DGIR submitted that with only a penalty of 45% having been imposed in this case (instead of 100%), it would suggest that it had considered all the relevant circumstances. For this submission, the DGIR referred to the report of a case stated in *BR Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2008) MSTC 3, 655, where the Special Commissioners stated that:

> ... Therefore, the Director General has a discretion to impose penalty under s 113(2) of the Income Tax Act 1967. 60% penalty was imposed and later was reduced to 25%. For us this shows that the Director General had applied his mind to the facts and circumstance of this case in using his discretionary power and there is no reason for us to interfere with the penalty imposed by him.

[160] In support of the DGIR's submissions that the defence of good faith is only available under s 113(1) reliance was again placed on the authority of *Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd* where the High Court at pp 424–425 (MLJ); p 1046 (CLJ) of the report, after holding that the defence of good faith is provided under s 113(1) of the ITA, went on to hold that:

> [46] ... The Supreme Court in *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co* [1992] 2 MLJ 708; [1992] 1 CLJ Rep 135 explained that the objective of assessment of tax contemplates filling of correct return by the taxpayer. Filling incorrect returns attracts a penalty under s 113(2) of the ITA. The court in that case held that this provision vested discretion in the Revenue Board, a discretion that cannot be exercised at [its] whim and fancy.
>
> [47] The evidence in this case shows that the Revenue Board became aware of the RM18,000,000 claimed as deduction only upon auditing. Not for the auditing, the respondent would not be aware that the deductible rental should be lesser instead. The appellant therefore would be paying less tax. The contention by the appellant that it was made in good faith due to the differing interpretation of the law cannot hold because ignorance of law cannot be a defence.
>
> [48] This country is now adopting a self-assessment regime. Thus, in line with the present policy where submission of returns is based on self-assessment by [a] taxpayer, a taxpayer must be mindful of his responsibilities to submit correct return[s] and must necessarily do so upon necessary consultation to ensure correct returns are submitted.

[161] The DGIR submitted that the High Court's decision in *Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd* which went up to the Court of Appeal was affirmed.

[162] The DGIR cited the case of *Shaklee Products (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Civil Appeal No W-01–45–10) (unreported) to advance the point that there the Court of Appeal had confirmed the decision of the High Court judge as regards the imposition of penalties by the Director General under para 113(2)(b) of the ITA 1967.

[163] On the taxpayer's reliance on the authority of *Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais*, the DGIR distinguished the same on the ground that it is a case on judicial review and hence it involves a consideration of the decision making process where the decision making body may have to justify its decision which the DGIR submits does not arise in an appeal by way of case stated as in the present case. Reliance was placed on the Federal Court authority of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1 for the principle that unless the statute expressly provides, there is no necessity to provide a reason. The court understood the DGIR as submitting that the ITA 1967 does not provide for such a need and therefore there was no need at all to provide any reason when he exercised his power to impose the penalty, which in any event, was within the range permitted.

The court's decision on the imposition of penalty

[164] The court agrees with the DGIR that there is no mention of the word 'good faith' in the provisions of s 113(2) unlike that in s 113(1) of the ITA 1967.

[165] Save for the lack of express mention of the word 'good faith', there is no single authority which has been cited above which expressly holds that good faith is not a defence when the DGIR seeks to impose a penalty under s 113(2).

[166] In fact, from all the authorities cited, they speak with one voice; namely, that the DGIR cannot act at his own whims and fancy and must consider all the relevant circumstances. This would drive any reasonable tribunal to the conclusion that good faith on the part of the taxpayer must be considered in the imposition of any penalty under s 113(2).

[167] In fact, there is a High Court case; namely, *Pasdec Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2016) MSTC 30–126 where Asmabi bt Mohamad J had these highly instructive words to say:

> Penalties
>
> 47. For the reasons I had mentioned above, I am of the view that the respondent was wrong in imposing penalties on the appellant under s 113(2) of the Act. Even assuming that the incorrect returns and/or incorrect information was submitted the same was *made in good faith* where full disclosures were made to the respondent. This was supported by the case of *KPHDN v Viva Life Science Sdn Bhd* (Civil Appeal No W-01–687–11 of 2011) (unreported)
>
> 48. As the appellant was not shown to have submitted incorrect information and/or incorrect returns, had made full disclosures pertaining to the method of computations in recognizing its income *and it is a matter of interpretation or difference of opinion* with respect to which method was to be adopted, I am of the

view that the s 113(2) of the Act ought not to be applied to the appellant. (Emphasis added.)

[168] Similarly, in this case, whether the taxpayer was engaged in agriculture as to qualify for the tax incentive under the 1999 Rules is a matter of interpretation.

[169] With all due respect to the DGIR, the deciding order was clearly expressed to be one made *by a majority* of the SCIT (encl 6 p 38) and not a unanimous one as submitted by the DGIR (see encl 6 para 4). This would clearly suggest that there was a difference of opinion amongst the members of the SCIT.

[170] It would be pertinent to bear in mind that the word 'penalty' is a derivative of the word 'penal' which the *Concise Oxford English Dictionary* (Thumb Index Ed) defines as 'relating to or prescribing punishment of offenders under the legal system; (especially of taxation and interest rates) and said to be extremely severe'.

[171] As it is a punishment, the defence of having acted in good faith would be available to the taxpayer when faced with the imposition of a penalty under s 113(2) of the ITA 1967.

[172] With there being differences amongst the SCIT on the imposition of the penalty even after having decided (by a majority) against the taxpayer on the first issue, clearly there had been doubts on the imposition of a penalty, and surely reasons ought to have been given for such an imposition which is are in the nature of a punishment with reference to the evidence led and submissions made before the SCIT.

[173] On whether there is any need for a public decision making body such as the DGIR to give reasons, this court is of the view that it has to, especially when challenged. In this regard, the court is mindful that the decision of *Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais* was one delivered by the Court of Appeal as compared to that of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* which was delivered by the Federal Court. However, *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* was decided on 29 November 2016 and the Court of Appeal had referred to and relied upon a more recent Federal Court authority, which is that of *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 4 CLJ 265 which grounds of judgment is dated 10 March 2017 and which held that:

It is also settled public law principle and *principle of natural justice that a public*

> *decision making body is under a duty to give reasons for its decision. Indeed, a reasoned decision can be an additional constituent of the concept of fairness.* (*Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 and *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193. *The giving of reason is also one of the fundamentals of good administration.* (Emphasis added.)

[174] Recently, in the decision handed down on 27 January 2021 by the Court of Appeal in Civil Appeal No W-01(A)-712–1–2 of 2018 *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1 ('the *Taman Rimba Kiara* case'), on the issue of duty to give reasons, Mary Lim Thiam Suan JCA (now FCJ) held:

> [112] *Then, there is the matter of duty to give reasons. We would have thought that the law on this issue is fairly clear and settled from the early years of Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 *where it was ruled that a 'reasoned decision can be an additional constituent of the concept of fairness' and where the reasons have to be given so that the right of appeal may be properly and meaningfully exercised*; to *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 (MPPP) where the Federal Court extensively reasoned on why there must be this duty to give reasons even if there is no express provision for such duty. *According to the Federal Court, this duty to give reasons emanates from the concept of fairness;* see also *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 4 CLJ 265 and *Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia* [2017] 6 MLJ 586; [2017] 10 CLJ 36 (see discussions of the same in *Save Britain's Heritage v Secretary of State for the Environment and others* [1991] 2 All ER 10).

[175] The absence of an express provision in any statute requiring the decision maker to give reasons does not mean that the duty does not exist unless and until the statute specifically states so. Even then, the case laws have developed progressively to instil an innate will on public authorities to explain their decisions. The Federal Court in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd* categorically held that:

> *The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large.* (Emphasis added.)

[176] The reasons for the penalty that has now made its way in the form of the submissions filed by the DGIR (see para 157 above) suggests that the DGIR was of the opinion that the taxpayer wilfully filed incorrect returns and these were only discovered by way of a field audit but there was no such evidence or facts found to this effect. As it turned out, the returns were premised upon how the taxpayer had interpreted the 1999 Rules which this court had found to be correct or which would, at the very least, be a reasonable interpretation.

[177] I am of the opinion that even if I were to have erred in my grounds above in the legal test to be adopted in the construction for the first issue, with the case authorities that obtain and discussed above, and with the SCIT themselves divided on all three issues, in particular, that of whether the taxpayer was engaged in agriculture, acting in good faith is also a defence available to the taxpayer and the taxpayer in the circumstances of this case ought not to have been penalised under s 113(2) of the ITA 1967 and the penalty ought to be set aside.

CONCLUSION

[178] Wherefore the appeal by the taxpayer on the first and third issues is allowed with costs and the appeal by the DGIR on the second issue is dismissed with costs, the deciding order by the SCIT on the first and third issues is set aside, the assessment and penalty discharged and if any of these have been paid, the same is to be refunded to the taxpayer with the deposit for the taxpayer's appeal to be refunded.

[179] Having heard parties by way of exchange of emails on the issue of costs on 2 February 2021, the court awards costs of RM20,000, subject to allocatur fees, to the taxpayer.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali